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No. 84-875

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ARIZONA PUBLIC SERVICE COMPANY, ET AL,
Petitioners,
versus
SALT RIVER PIMA-MARICOPA INDIAN COMMUNITY,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether respondent, which has irrigable land lying within the Salt River Project, a federal reclamation project, has standing to challenge a contract for the illegal delivery of project water for non-project purposes, where such illegal delivery impacts adversely and uniquely on the amount of water delivered to the respondent's project land.

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The respondent, Salt River Pima-Maricopa Indian Community, submits this brief in opposition to the petition for writ of certiorari to the Ninth Circuit Court of Appeals.

STATEMENT OF THE CASE

The petition seeks interlocutory review of a portion of a case that was remanded by the Court of Appeals. The petitioners are not now being restrained in any fashion from conducting business as usual nor is any interim restraint being sought.

The question presented is whether the respondent has alleged standing to assert its claim against the petitioners. The case, though commenced three years ago, has not progressed beyond the pleading stage. Accordingly, resolution of the question entails reading and interpreting the complaint and nothing more. The parties are in total agreement on the legal standard applicable to the question. The Court of Appeals, recognizing that this is a *sui generis* interpretation of a pleading, made its decision in an unpublished memorandum which has no effect as precedent in other cases.

This petition deals only with one, i.e. the fifth, of five claims for relief which are stated in the complaint. The Fifth Claim for Relief is a challenge to the validity of a certain contract for the sale of federal reclamation project water for a nuclear power plant outside of the boundaries of the project. The contract sellers of this project water are six cities situated within the project boundaries; the contract buyers are two Arizona utilities, Arizona Public Service Company and Salt River Project Agricultural Improvement and Power District. All of the eight parties to the contract are parties to the Fifth Claim but only one of them, Arizona Public Service Company, is a petitioner here. The other petitioners are out-of-state utilities that own fractional interests in the power plant.

The five claims in the complaint are tightly interrelated. The First Claim for Relief, directed only against the Secretary of the Interior and the United States, seeks an Admin-

istrative Procedure Act review of allegedly illegal actions of the Secretary of the Interior which cause great injury to the respondent. The other four claims are directed against other defendants whose joinder is required to remedy the wrongs alleged in the First Claim. Accordingly, the Fifth Claim for Relief, which is in issue here, should be read in conjunction with the related allegations in the First Claim.

The First Claim states: that the respondent's reservation land lies within the boundaries of the Salt River Project, a federal reclamation project within the statutory jurisdiction of the Secretary of the Interior; that all of the non-reservation land within the project receives project irrigation benefits but that the respondent's project land is uniquely excluded by order of the Secretary; that the only stated reason for the discriminatory exclusion of this Indian land is that there is an insufficiency of project water; that the Secretary has approved or acquiesced in three contracts for delivery of 185,000 acre feet of water annually to users outside of the project boundaries; that the laws governing federal reclamation projects authorize delivery contracts such as these only where the water is surplus to the agricultural needs of the project; that since respondent's land is excluded from the project because of a supposed shortage of water, these contracts are illegal; that one of the three contracts is the contract for the sale by the project cities of wastewater effluent, which is at least 90% project water, to an off-project nuclear power plant; and that the federal reclamation laws require that this project water be recaptured for use on project lands.

The Fifth Claim is directed against the parties to the wastewater effluent contract and against other utilities with ownership interests in the power plant. It tracks the allegations of the First Claim regarding this contract, and alleges that the contract is illegal and that it directly injures the respondent by lessening the amount of water available to it.

As shown in the trial court's Memorandum Opinion and Order, the petitioners moved to dismiss the complaint on the grounds, among others, that the respondent failed to join indispensable parties as required by Rule 19, Federal Rules of Civil Procedure. They did not contend there that the respondent lacked standing.

WHY THE COURT SHOULD DENY THE PETITION

A. The Issue is Without any Significance Beyond this Case.

The Ninth Circuit decision which the petitioners want reviewed is nothing more than the law of this case pending an evidentiary hearing. It has no impact on any other litigation. It was issued in the form of an unpublished memorandum under Rule 21(c), Rules of the Ninth Circuit Court of Appeals. This means that all three members of the panel agreed that the decision has no precedent value.

There is no issue of law presented by the petition. We all agree that there must be a cause-effect relation between the effluent water delivery contract and the deprivation suffered by the claimant. We join the petitioners in support of the principles of *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) and the other standing cases. The issue is whether, under the particular facts of this case, the claim for relief pending in the trial court against the petitioners and others meets the test of those cases.

B. The Question Presented is not Ripe for Review.

The misunderstanding as to the interpretation of the complaint will probably be resolved and will certainly be clarified by trial court findings based upon an evidentiary record. When the trial court proceedings are completed all the questions that may be raised by all the parties, including the standing question raised by the petitioners, will be open to appellate review. In the meantime the petitioners are not burdened by any restraint and they are free to conduct business as usual.

After this controversy passes through the trial process the significant questions in the litigation will become distilled from the evidentiary record. Then we can focus on such questions as: Was there a rational basis in fact and law for the denial of project benefits uniquely to Indian lands; Is the Secretary obligated to enlarge project water supplies to serve Indian project lands by recapturing project sewage effluent under the rule of *Ide v. United States,* 263 U.S. 497 (1924); and is the Secretary's duty and discretion as to deliveries of project effluent for power generation purposes constrained by Section 9(c) of the Reclamation Project Act of 1939, 53 Stat.1187, 43 U.S.C.§485h(c). The question presented in the petition is of *de minimis* importance compared to the real issues that have yet to be confronted.

CONCLUSION

For these reasons the respondent requests that the petition be denied.

Respectfully submitted,

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